UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/332/Add.4
3 April 1990

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Twenty-third session
New York, 25 June - 6 July 1990

INTERNATIONAL COUNTERTRADE

Draft legal guide on drawing up contracts in international countertrade transactions: sample chapters*

Report of the Secretary-General

Addendum

V. TYPE, QUALITY AND QUANTITY OF GOODS

Contents

	Paragraphs
A. General remarks	1
B. Type of goods	2 - 11
C. Quality of goods	12 - 18
1. Specifying quality	13 - 14
2. Pre-contractual quality control	15 - 18
(a) Identity of inspector	16
(b) Inspection procedures	17
(c) Effect of inspector's finding	18
D. Quantity of goods	19 - 27
1. General remarks	19 - 25
2. Additionality	26 - 27
E. Modification of provisions on type, quality and quantity	28 - 29

* The text contained herein is a first draft prepared by the Secretariat for consideration by the Commission as part of the preparatory work on the draft legal guide on drawing up contracts in international countertrade transactions and should not be regarded as stating the views of the Commission.

V.90-82417

4881T

A. General remarks

1. The parties may either identify in the countertrade agreement the type of goods that will be the subject of the future supply contract, possibly stating only broad categories of goods, or not stipulate the type of goods. The more precise the countertrade agreement is with respect to the type of goods, the greater the possibility is of stipulating in the countertrade agreement the quantity and quality of the goods. Precision as to type, quality and quantity increases the likelihood that the intended supply contract will be concluded. Sometimes, even though the type of countertrade goods is identified in the countertrade agreement, the exact quality and quantity of the goods are left for later determination because the conditions on which the parties wish to base their decision on quantity and quality are not yet fully known. This chapter focuses on issues to be dealt with in the countertrade agreement when the parties have not settled all aspects of the type, quality and quantity of the countertrade goods.

B. Type of goods

2. Various considerations may enter into the selection of the type of goods. The supplier would prefer that the goods be those that could easily be made available or those that the supplier wishes to introduce in a new market, while the purchaser would like to purchase goods that are needed or could be resold easily. The freedom of the parties to agree on the type of goods to be supplied in one or both directions may be affected by government regulations. For example, in some countries government regulations exclude certain types of goods from being offered for purchase in a countertrade transaction if the price of the goods is not to be remitted as in an ordinary sale. Such regulations are intended to ensure that goods that can be sold for convertible currency are not sold in transactions that restrict the transfer to the supplier of the convertible currency. Government regulations may also provide that the import of certain types of goods is permitted only if the exporter agrees to purchase goods in return.

3. The choice of the parties as to type of goods may also be restricted by government regulations requiring that the countertrade goods must originate in the country, or in a particular region of the country, or must be purchased from a particular economic sector or group of suppliers. Such restrictions on origin and source are particularly likely to be encountered when the party requiring a countertrade commitment is a governmental entity. It is advisable that any restrictions on origin and source of goods be reflected in the countertrade agreement. Clauses in the countertrade agreement concerning origin and source restrictions are discussed in chapter VII, "Fulfilment of countertrade commitment", paragraphs __ to __, and chapter VIII, "Participation of third persons", paragraphs __ to __.

4. When the parties conclude a countertrade agreement without determining the type of goods, they may wish to include in the countertrade agreement a list of possible countertrade goods, the purchase of which would count toward fulfilment of the countertrade commitment. Where the countertrade agreement is concluded prior to the supply contracts pertaining to deliveries in both directions (chapter III, "Contracting approach", paragraph 19), there may be two lists, one for each direction in which goods will be shipped. The product list may be attached to the countertrade agreement at the time of signature or may be agreed upon later.

5. The countertrade agreement should be clear as to the nature and extent of the undertaking of the parties with respect to a list of possible countertrade goods. The supplier may undertake to make available all the types of goods on the list. In such a case the purchaser would be free to choose from among different types of goods appearing on the list, unless the countertrade agreement restricts the purchaser's choice. For example, there may be a limit on the number of different types of goods that may be purchased or there may be minimum or maximum levels set for the purchase of certain types of goods.

6. The undertaking of the supplier as to availability may be limited to certain specified types of goods on the list. In such a case, the purchaser would be free to choose from among the goods that are identified in the countertrade agreement as being available. The possibility of purchasing any of the other types of goods, whose availability is not assured, would be left to subsequent negotiation.

7. It may be agreed that the purchaser's commitment is to be reduced to the extent the supplier fails to make available those types of goods that are identified in the countertrade agreement as being available (see chapter VII, "Fulfilment of countertrade commitment", paragraph __). In addition, the supplier's commitment to make available goods appearing on a list may be supported by a liquidated damages or penalty clause (see chapter XI, "Liquidated damages and penalty clauses") or a guarantee (chapter XII, "Security for performance").

8. When the supplier does not make an undertaking as to the availability of any particular type of goods appearing on the list, the determination of the types of goods actually available will occur in the course of the subsequent negotiations. If the supplier fails to make available any of the goods on the list, the purchaser would not be liable for the failure to fulfil the countertrade commitment (see chapter VII, "Fulfilment of countertrade commitment", paragraph __).

9. The parties may wish to state in the countertrade agreement that the purchaser is obligated to supply within a specified time period the specifications necessary to establish accurately the purchaser's requirements with respect to the goods to be purchased and to enable the supplier to make a corresponding offer. The countertrade agreement may indicate that specifications will be provided by a third party (e.g., a trading house engaged to purchase the goods, or an end-user).

10. Because countertrade agreements are often entered into for the purpose of developing new exports or new markets for existing exports, selection of the countertrade goods could be conditioned on a requirement that the goods be a non-traditional export of the supplier or, if they are a traditional export, that they be resold in a new market. Where the purchaser has made prior purchases from the supplier or has a prior commitment to purchase goods from the supplier, the countertrade agreement may stipulate that the purchase is to be of a new type of goods and must result in a level of sales higher than established levels in order to be counted towards fulfilment (see also paragraphs 26 and 27 below, concerning "additionality" as a factor in setting the quantity of goods). It is advisable that the countertrade agreement define the requirements as to new products or markets, either by identifying products and markets considered new or identifying those not considered new.

11. Establishing a procedure in the countertrade agreement for making decisions on the type of countertrade goods may be helpful, particularly in a long term countertrade transaction or one involving multiple parties. For example, the parties may wish to form a joint committee that would meet at regular intervals to identify countertrade goods and to monitor fulfilment of the countertrade commitment. Procedures established for identifying countertrade goods should be coordinated with deadlines in the fulfilment schedule. (See chapter VII, "Fulfilment of countertrade commitment", paragraph __; for a general discussion of negotiation, see chapter III, "Contracting approach", paragraphs 39 to 42). Such a joint committee might also be utilized to settle the price of the goods (see chapter VI, "Pricing of goods", paragraph __).

C. Quality of goods

12. The question of quality of countertrade goods raises two main issues that the parties may wish to address in the countertrade agreement. The first involves specifying the level of quality that the goods must meet; the second involves establishing procedures to ascertain, before the conclusion of a supply contract, that goods being offered meet the specified level of quality (pre-contractual inspection). Agreement on both aspects of quality may help the parties to avoid disagreements over such questions as whether the party committed to purchase countertrade goods is obligated to purchase particular goods offered by the supplier or whether they are worth the price at which they are offered.

1. Specifying quality

13. If the type of goods is not identified in the countertrade agreement, or is identified only by broad categories, precise statements of quality cannot be made. In such cases, the parties may only be able to state quality requirements in general terms such as "export", "prime" or "marketable" quality. When the type of goods is identified, it is advisable to be as precise as possible with respect to quality. General statements on quality may be sufficient if the goods are commodities or manufactured goods with standardized levels of quality (e.g., wire, steel sheets or petro-chemical products). Statements of quality can be made more precise, for example, by referring to a particular country or market, to the purpose for which the goods must be fit, or to packaging, safety and environmental requirements.

14. The parties may wish to address in the countertrade agreement the remedies of the purchaser in the event that goods delivered under supply contracts concluded subsequently do not meet quality standards stipulated in the countertrade agreement or in individual supply contracts. By including such provisions in the countertrade agreement, the parties could avoid negotiating the question of the purchaser's remedies each time a supply contract is concluded.

2. Pre-contractual quality control

15. This section deals with pre-contractual quality control, i.e., quality control carried out before the conclusion of a supply contract by the party committed to purchase in order to establish whether the goods offered conform to the quality standards set in the countertrade agreement. Pre-contractual

quality control allows the parties to avoid difficulties that may arise if, after a supply contract is concluded, the goods are discovered not to meet the agreed quality standards.

(a) Identity of inspector

16. The pre-contractual quality control may be conducted by an inspector designated either by the party committed to purchase or by the parties jointly. When the inspector is to be designated jointly, the parties may wish to stipulate in the countertrade agreement criteria for the selection of the inspector. When the type of goods has been identified, the parties would be in a better position to name the inspector since the subject matter in which the inspector would need expertise would be known to the parties.

(b) Inspection procedures

17. The parties may wish to agree on various aspects of the inspection procedure such as: the location and time of inspection; the mandate of an inspector to be designated jointly; whether, in the case of an inspector designated by the purchaser, the supplier will be informed of the inspector's mandate; the inspector's duty of confidentiality; deadlines for submission of the inspector's report; a requirement that reasons be stated for a finding that the goods are non-conforming; whether sampling and testing procedures customarily used in a particular trade suffice or whether ad hoc procedures need to be established; additional inspections or tests when the result of an inspection is contested (e.g., it may be agreed that a party could request a further inspection to be conducted by a second inspector and that the second inspection would be controlling); and cost of inspection.

(c) Effect of inspector's finding

18. It may be agreed that the inspector's finding would be regarded as a statement of opinion on the basis of which the parties would consider what steps to take. Alternatively, it may be agreed that a finding by the inspector as to the quality of the goods would directly affect the contractual relationship of the parties. For example, it may be agreed that a supply contract would be deemed concluded in the event that the inspector finds that the goods conform to the quality standard stipulated in the countertrade agreement; in the event of a negative finding, the supplier's offer to conclude a supply contract would be deemed not accepted and the rejection of the goods in question would not constitute a breach of the countertrade commitment. Where the countertrade agreement envisages various levels of quality, it may be agreed that the inspector's finding as to quality would be used in a formula for determining the price of the goods.

D. Quantity of goods

1. General remarks

19. When the countertrade commitment refers to goods of one specified type, the quantity of goods to be purchased may be stipulated in the countertrade agreement or left to be determined at the time of the conclusion of the supply contracts on the basis of the extent of the countertrade commitment. When the parties express the countertrade commitment as a

monetary amount, rather than as a quantity of goods to be purchased, they may wish to postpone determining the quanity until the conclusion of the supply contract. Such a postponement would allow fluctuations in the unit price of the goods to be taken into account. An increase in the unit price would mean a reduction in the quantity of goods to be purchased, while a drop in the unit price would mean an increase in the quantity to be purchased. When the countertrade commitment is expressed in terms of the number of units to be purchased, the parties may wish to stipulate a minimum monetary amount so that, in the event of a drop in the unit price, additional units would have to be purchased.

20. When the countertrade agreement provides for several possible types of goods, the quantity of each type of goods that will be purchased may be left to be determined at the time of the conclusion of the supply contracts. The overall value of the purchases would have to be in conformity with the extent of the commitment set in the countertrade agreement. The countertrade agreement may specify the minimum and maximum percentages of the countertrade commitment that may be fulfilled by purchase of each type of goods.

21. Where the parties are not in a position to determine quantity in the countertrade agreement, it may be useful for the countertrade agreement to set a deadline for agreement on quantity. The parties may refer to a specific date (e.g., 30 days before the close of a subperiod of the fulfilment period) or to an event in the contract in the other direction (e.g., in a bu"-back transaction it may be agreed that quantity is to be determined upon the start-up of the plant delivered under the export contract).

22. It may also be agreed that, at specified points in the period for the fulfilment of the countertrade commitment, a party committed to purchase would be obligated to provide an estimate of the quantities of goods expected to be purchased in the upcoming period of time. Similarly, a party committed to supply goods may agree to periodically provide an estimate of the quantity of goods expected to be made available. The parties may wish to agree on a permitted deviation between the estimated quantities and the quantities actually purchased or made available.

23. When the proceeds of the export contract are to be used to pay for the counter-export contract, it is advisable that the parties ensure that the quantity purchased under the export contract is such that the proceeds of the export contract would cover payment for the counter-export contract. Payment mechanisms used in such cases are discussed in chapter IX.

24. If the parties foresee the possibility of purchases of quantities beyond those stipulated in the countertrade agreement, they may wish to consider whether the purchaser's additional orders will be granted any preference over other potential buyers. A related issue is whether the additional quantities would be supplied on the same terms as the original quantities envisaged in the countertrade agreement.

25. The parties may leave the quantity of goods to be determined on the basis of the purchaser's requirements. In such cases, the parties may wish to consider whether the supplier is to be the purchaser's single source for the goods and whether the purchases are to fall within a range specified in the countertrade agreement. The quantity of the goods may also be determined on the basis of the supplier's output of a given product. This approach may be

used, for example, in a buy-back transaction. In this case too, the parties may wish to stipulate that the purchases are to fall within a range set in the countertrade agreement.

2. Additionality

26. When the purchaser has made prior purchases from the supplier of a given type of goods, the provisions in the countertrade agreement regarding quantity may contain a concept often referred to as "additionality". According to this approach, only those purchases that exceed the usual quantities purchased will be considered as fulfilling the countertrade commitment. The parties would normally be able to establish the threshold of additionality by agreeing on the quantity that is to be regarded as the usual or traditional purchase. When the parties do not identify the type of goods in the countertrade agreement, they may include a general stipulation that if the goods ultimately selected are of a type that the purchaser is already buying, only those purchases above existing levels would be counted toward fulfilment of the countertrade commitment.

27. Where the arrangement allows the purchaser to choose from a number of eligible suppliers other than the party to whom the countertrade commitment is owed (e.g., in an indirect offset transaction), the additionality threshold would not be based on previous trade volume between the parties to the countertrade agreement, but on the trade volume with the suppliers selected or on the volume of previous purchases by the committed party in the suppliers' country. The parties may wish to identify the sources of any trade information to be used in setting the additionality threshold.

E. Modification of provisions on type, quality and quantity

28. A need for a review of provisions on type, quality or quantity of goods may arise due to the unavailability of goods specified in the countertrade agreement, the desire to place additional products on a list, a change in the commercial conditions underlying the transaction, a shift in the commercial objectives of the parties or a governmental regulation affecting the choice of countertrade goods. It could be agreed, particularly in long term transactions, that the parties would review the provisions on type, quality and quantity of goods either at regular intervals or in response to changes in circumstances stipulated in the countertrade agreement (e.g., a change beyond a certain threshold in the price of the goods). The review could be carried out within the framework of a mechanism for monitoring and coordinating fulfilment of the countertrade commitment (see chapter VII, "Fulfilment of countertrade commitment", paragraph __).

29. In order to avoid a modification procedure, the parties may wish to provide that under certain conditions fulfilment credit would be earned by the purchase of goods other than those agreed upon in the countertrade agreement or appearing on a list of possible countertrade goods. For example, it might be required that the purchases in question meet an additionality test (paragraphs 26 and 27 above), or it may be stipulated that they would earn fulfilment credit at a reduced rate (for further discussion of clauses allowing non-conforming purchases to be counted toward fulfilment of the countertrade commitment, see chapter VII, paragraph __).